

Religious Establishment, Pluralism and Equality in Israel—Can the Circle be Squared?

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Israel's constitutional structure purports to combine strong establishment of the Orthodox Jewish religion in the state with respect for liberal values such as pluralism equality and liberty. Whereas the establishment of the Orthodox Jewish religion is achieved through laws regulations and administrative power, liberal values that are only partially enshrined in law, are mostly defended and articulated by the Israeli Supreme Court. Focusing on the internal conflicts within the Jewish majority the article will show how the power granted to the Orthodox Jewish religion by the state has been used to circumvent liberal values and will examine the role of the Israeli Supreme Court in ameliorating this problem. It will argue that although in countries in which religion and the state are separated a 'hands-off' approach to pluralism may be sufficient to protect liberal values, in a country such as Israel with a strong religious establishment a more activist approach, which will be termed 'egalitarian pluralism' is required. The article will argue that an egalitarian pluralist approach is needed in order to maintain Israel's dual commitment to its nature as a 'Jewish and Democratic' state and will assess and critique the partial implementation of this approach by the Israeli Supreme Court.

1. Introduction

Israel is a deeply divided society. The two most significant rifts in Israeli society are the rift between the Jewish majority and the Arab minority, and the rift that exists within the Jewish community between secular and non-Orthodox Jews on the one hand, and Orthodox and ultra-Orthodox Jews on the other.¹ Thus, Israeli society is a highly heterogeneous society which consists of communities that differ markedly in terms of religious and national aspirations, some of which are avowedly illiberal and openly reject democratic values.

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¹ The three main streams of Judaism are Orthodox Judaism (which includes the more radical ultra-Orthodox Judaism), Conservative Judaism and Reform Judaism (the latter two are sometimes referred to together as non-Orthodox Judaism). According to the most recent detailed survey, conducted by the Israel Democracy Institute, 22% of Jews in Israel self-identify as Orthodox, 9% as ultra-Orthodox, 4% as Conservative, 4% as Reform and 50% as not belonging to any stream (43% of Israeli Jews self-identify as secular). See Shmuel Rosner, 'Can you believe it? Israel has more Conservative and Reform Jews than Haredis', *JewishJournal.com* (23 February 2012) <http://www.jewishjournal.com/rosnersdomain/item/can_you_believe_it_israel_has_more_conservative_and_reform_jews_than_haredis/> accessed 10 October 2012.

While the fact of pluralism is not unique to Israel, and is characteristic of most modern liberal democratic states, what makes the Israeli case unique is the depth and spread of the divisions between the different communities, as well as the constitutional arrangements designed to deal with those divisions, and in particular, the definition of the state as a Jewish and democratic state. This definition attests to the continuous tension between Israel's particularistic aspiration to be the homeland of the Jewish people, and its universalistic aspiration to be, at the same time, a western liberal democracy dedicated to universal values such as pluralism and equality. In this article I will discuss the constitutional arrangements aimed at regulating the status and the role of the Jewish religion in Israel. While the relations between religion and state in Israel affect all religious denominations, my discussion will be limited to the intra-Jewish conflicts that arise as a result of the control of Orthodox Judaism over the religious establishment in the state. As will be further explained below, the establishment of the Jewish religion in the state has been accompanied by the continuation of the Ottoman millet system and the giving of religious autonomy to minority communities, including the Muslim community and various Christian denominations. Thus, perhaps paradoxically, the major controversies that this establishment has generated have been internal Jewish controversies and not inter-religious controversies.

The article will show how the establishment of the Jewish religion in Israel, which consists of giving power, money and preferential treatment to the Orthodox Jewish religion, has been detrimental to pluralism, liberty and equality. I will argue that the Israeli Supreme Court has tried to mitigate this problem by setting and interpreting these constitutional arrangements in such a way as to enhance pluralism, equality and liberty, within the constraints placed on it by law and by politics. I will show that within the Israeli constitutional system the court has had an important role in advancing norms of what I will call 'egalitarian pluralism', in areas such as budget allocations, the allocation of public space and even in cases involving semi-internal matters within the religious community, such as the education of children. Nevertheless, in addition to the fact that the court's attempts to promote egalitarian pluralism have not always been consistent, they have often been thwarted by the legislature and by political manoeuvring, bringing into question the possibility of squaring the circle and creating a constitutional model that combines strong religious establishment with the preservation of pluralism, liberty and equality for all.

In order to place the Israeli model within contemporary constitutional models for dealing with religious pluralism, I will first shortly describe two different and somewhat contradictory constitutional church state models—the American model and the German model. The American model calls for a double-sided separation of church and state, in which the state separates itself from religion, prohibiting any involvement of religion in state matters, while also ruling out any involvement of the state in religious matters. In contrast, the German model is based on state recognition of the importance of religion for the maintenance of a well-ordered society, and its importance in the life of individuals, and therefore gives recognized religious denominations a special

semi-public status and permits the state to work in cooperation with religious organizations in areas such as welfare and education. Nevertheless, what the two models have in common is a strong reluctance on the part of the courts to get entangled in matters concerning the activities of religious organizations, due to considerations of religious autonomy and religious freedom. After briefly describing these two models I will discuss the Israeli model and emphasize its differences and similarities with these two models, highlighting the unique features of the Israeli system, including the definition of Israel as a Jewish and democratic state as well as its other deviations from liberal democratic legal arrangements of religion state relations. Against this background I will highlight the relatively activist role that the Israeli Supreme Court has taken upon itself in matters concerning religion and religious organizations. Despite Israel's deviation from the liberal model I chose to contrast it with two liberal democracies—the United States and Germany, and not with countries with strong entanglement of religion in the state, such as Malaysia.² The reason for this is that my main aim in this article is not to point to the illiberal nature of Israel's religious establishment, but to highlight the way in which the dual commitment of the state to religious establishment as well as to liberal values necessitates an interventionist approach by the court in order to protect liberal values, although such an approach may in itself arguably be critiqued as illiberal.

Specifically I will describe the emergence and the application of the doctrine of egalitarian pluralism in the Israeli Supreme Court's case law, and the legal and political limitations on its application. Egalitarian pluralism, which is animated mostly by the value of equality, differs from the 'hands off' pluralism which is espoused by many liberal supporters of pluralism and which is animated first and foremost by the value of liberty. 'Hands off' pluralism allows religious groups an almost complete freedom to conduct their own affairs without state interference. This is for example the approach apparent in the famous *Wisconsin v Yoder* case, or the recent *Hosanna-Tabor* case, and advocated by theorists such as Galston.³ Conversely, egalitarian pluralism differs from 'hands off' pluralism in the emphasis it places on maintaining equality, not only at the level of state support for religious groups, but also to some extent at the intra-group level. Furthermore, egalitarian pluralism is concerned not only with preventing discrimination by the state, and to some extent, by the group, but it is also concerned with placing equal demands on

² For an enlightening discussion of countries with strong religious establishments see Ran Hirsch, *Constitutional Theocracy* (Harvard University Press 2010).

³ A famous American example of the hands off approach is the case of *Wisconsin v Yoder* (1972) 406 US 205, in which the American Supreme Court has upheld the right of the Amish to pull their children out of school at the age of 14 finding that the state law mandating compulsory education until the age of 16 unduly burdened the Amish right to free exercise and their right to lead their own traditional mode of life which is dictated by their religious beliefs.

In the recent *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) 565 US. The US Supreme Court affirmed and expanded the doctrine of ministerial exception thereby further restricting the state's ability to intervene in employment decisions by religious organizations even when these are allegedly taken on discriminatory bases such as disability. See <<http://www.supremecourt.gov/opinions/11pdf/10-553.pdf>>.

For Galston's theory of pluralism, see eg William A Galston, *The Practice of Liberal Pluralism* (Cambridge University Press 2005)

citizens of the state in terms of recognition, tolerance and the sharing of burdens, regardless of the religious community to which they belong. In support of this doctrine, I will claim that the only way to maintain equal rights for all in a democratic, but deeply divided society, such as Israel, in which there is considerable entanglement between the Orthodox Jewish religion and the state, and in which religious illiberal groups have gained significant political power, is by actively enforcing a norm of egalitarian pluralism. Consequently, the Israeli Supreme Court should intensify its efforts to enforce this norm in the face of governmental and parliamentary reluctance to do so.

One could object that in a country that defines itself as Jewish and democratic state and which purposefully gives a preferred status to Judaism it is simply inconsistent to insist on enforcing a norm of egalitarian pluralism and on protecting equality, pluralism and liberty for all. Certainly, most Orthodox and ultra-Orthodox political parties, and many of their constituents, would consider that the protection and expansion of Orthodox Jewish religion should be given precedence over democratic values such as equality, pluralism and liberty. Furthermore, it is often argued that any attempt to undermine the preferred status of Orthodox and ultra-Orthodox Judaism in Israel is tantamount to denying Israel's character as a Jewish and democratic state and transforming it into a secular liberal democracy. However, I wish to claim that these arguments should be rejected not only from the perspective of Israel's commitment to its democratic nature but also from the perspective of its commitment to its Jewish nature. From the perspective of Israel's commitment to its democratic nature, Israel prides itself in maintaining democracy and human rights and in treating all citizens as equal, regardless of the emphasis it places on its Jewishness. Thus, it would seem fair to say that while the state does put an emphasis—whose exact contours are, as we will see, fiercely debated—on its Jewishness, it is at the same time committed to (borrowing Rawls' formula) maintaining 'over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical and moral doctrines'.⁴ But furthermore, from the perspective of Israel's commitment to its Jewish nature, the monopoly that Orthodox and ultra-Orthodox Judaism seek and largely succeed in maintaining due to historical reasons and through the use of political power, contravenes Israel's fundamental commitment to serve as the national homeland of the entire Jewish people, be they secular, Orthodox or non-Orthodox. It is quite striking to observe that due to the current nature of Israel's religious establishment Israel is the only country in the world that discriminates between Jews on the basis of the type of Judaism which they espouse.

Thus, the model of egalitarian pluralism which can be discerned in some Israeli Supreme Court decisions and which is advanced in this article is not a model intended to, or capable of, turning Israel into a secular liberal democracy. Rather, it is a model which attempts to ensure that the high level of entanglement of religion in the state in Israel, in terms of state power, of budget allocations, and of support for religious communities, will not undermine Israel's fundamental commitment to its dual nature as both a democratic and a Jewish state.

⁴ John Rawls, *Political Liberalism* (Columbia University Press 1996) 4.

2. *Constitutional Models for Dealing with Religious Pluralism—United States and Germany*

A. *United States*

The religion clauses of the First Amendment to the US Constitution read as follows: ‘Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.’ The principle of separation between church and state has always been, and continues to be, a fundamental principle in US Constitutional law, although the exact contours of the principle have been disputed and transformed over the years. The wording of the First Amendment was supported not only by liberals but also by evangelicals. While the evangelical supporters of separation saw it as a means of protecting religion from state interference and did not wish to free either politics or the state from the influence of the church, liberal supporters of the separation envisioned a double-sided separation in which the church is free from state interference, but at the same time the state and politics are free from intrusions by religion and by the religious establishment.⁵ Thus, liberals supported an absolute two-sided separation that was motivated by distrust and suspicion towards the state, as well as towards organized religion. For them, to allow church and state to combine their forces was to invite absolutism and oppression.⁶ The distrust of government and of state power, which is typical of the American constitutional system, also explains the relatively strong protection for the free exercise of religion and for religious autonomy. American constitutional law shies away from any entanglement of the state in religious matters, giving strong protection to the autonomy of religious organizations. Thus, for example, American courts have established a doctrine of ministerial exception, which prevents the courts from interfering with employment decisions of religious organizations regarding clergy and other religious employees who engage with religious doctrine, even if such decisions represent a violation of anti-discrimination laws.⁷ While historically the religious freedom of individuals was also given strong protection and could only be restricted in the face of a compelling state interest, in recent years this protection has been somewhat narrowed by decisions holding that religious belief did not constitute grounds for an exemption from applicable neutral laws.⁸ Nevertheless, protections for religious organizations have remained strong and have even become stronger.⁹

B. *Germany*

The relationship between church and state in Germany can be characterized as involving four principles: state neutrality, freedom of religion, church state

⁵ John Witte Jr, ‘The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay’ (1991) 40 *Emory Law Journal* 489, 494–5.

⁶ *ibid.*

⁷ See eg, *Lynette Petruska v Gannon University*, 2006 US App LEXIS 15088 (decided 20 June 2006)

⁸ Compare *Sherbert v Verner* (1963) 374 US 398 with *Employment Division v Smith* (1990) 494 US 872.

⁹ See *Hosanna-Tabor Evangelical Lutheran Church and School* (n 3).

partnership and the autonomy of religious organizations.¹⁰ All these principles can be found in the German Basic Law, which among other things states that there shall be no state church in Germany.¹¹ Nevertheless, the German understanding of state neutrality is hardly the system of strict separation between church and state which can be found in other liberal countries, such as the United States. Quite to the contrary, Germans see the churches and the state as partners who both have a role to play in creating a prosperous and stable German society. Moreover, they understand freedom of religion as a positive, not merely a negative, freedom, which means that the state has a positive duty to ensure that religious people and religious associations can exercise their religious freedoms.¹² Thus, state neutrality is understood as a duty to support all religions without giving preference to one religion over others. Consequently, the German constitution enables the state to grant religious associations the status of corporations under public law and allows these religious associations to levy taxes that finance their operations and to enjoy public subsidies.¹³ Furthermore, the German state gives religions a highly deferential treatment and allows them an important role in the public domain, and especially in the areas of welfare services. Consequently, the most important welfare associations in Germany are religious—Protestant and Catholic.¹⁴ However, the duties of the state towards religions do not entitle it to intervene in the life of religious associations in any way, and these associations enjoy a basic right to autonomy and are free to regulate and administer their own affairs, without state interference.¹⁵ The German court has interpreted freedom of religion broadly, to include not only the freedom to believe but also the right to act according to one's belief. Thus, its protection for religious freedom is even broader than in the United States. Additionally, it extended expansive religious autonomy rights not only to churches but to any association directed towards the attainment of a religious goal, such as religious charity associations.¹⁶ For example, the German Constitutional Court refused to intervene in a case where a Catholic hospital dismissed a doctor for stating publicly that he opposed the teachings of the Catholic Church on abortion. The court held that the hospital's actions were protected by the right of the Catholic Church to self-determination.¹⁷

¹⁰ Stephen V Monsma and J Christopher Soper, *The Challenge of Pluralism: Church and State in Five Democracies* (Rowman and Littlefield 1997) 155.

¹¹ Article 137(1) Of German Constitution of 1919.

¹² Monsma and Soper (n 10) 155; Freedom of religion is guaranteed in Art 4(1) of the Basic Law.

¹³ Art 137 (5) & (6).

¹⁴ As one commentator, writing before the unification of Germany, observes, '[t]he existence of these denominational welfare agencies illustrates the primary importance of the Protestant and Catholic churches among West Germany's parapublic institutions. West Germany's Basic Law guarantees freedom of religion and a separation of church and state which has little bearing on the privileged position that the big churches enjoy in public life.' Peter J Katzenstein, *Policy and Politics in West Germany: The Growth of a Semi-sovereign State* (Temple University Press 1987) 74. The special public position of the churches has not changed following the reunification of Germany. See Gerhard Robbers, 'State and Church in Germany' in Gerhard Robbers (ed), *State and Church in the European Union* (Nomos 1996) 57–73, at 66.

¹⁵ Art 137(3).

¹⁶ Monsma and Soper (n 10) 165–6.

¹⁷ Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Duke University Press 1997) 494. The case is *The Catholic Hospital Abortion* case 70 BVerfGE 138 (1985).

3. *Religion and State in Israel*

Against this background the willingness of the highly liberal Israeli Supreme Court to deal with issues relating to religious institutions may seem problematic. However, this willingness should be assessed in light of the unique religion state relations that exist in Israel. Unlike most other liberal democratic states whose definition does not include a reference to the ethnic or religious character of the state, Israel is defined in its Basic Laws as a Jewish and Democratic state. This definition is relatively new, and was adopted along with the two Basic Laws on human rights—Basic Law: Human Dignity and Basic Law: Freedom of Occupation.¹⁸ However, the origins of this definition can be traced to the Israeli declaration of Establishment, which states that Israel is to be a ‘Jewish state’, but at the same time that it will ‘ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.’¹⁹ It is important to note that there is an ongoing and as of yet unsettled debate with regard to the exact meaning of the definition of Israel as a Jewish state. While some consider that the definition of Israel as a Jewish state constitutes an establishment of the Jewish religion in the state, and the granting of varying degrees of legal authority and status to the Jewish religion, others dispute this reading of the Basic Laws, arguing that the definition ‘Jewish state’ should be understood as a national definition designating the character of Israel as the home of the Jewish people, where Jews realize their right to self-determination, and not as an establishment of the Jewish religion in the state.²⁰ Notwithstanding the debate over the ramifications of the definition of Israel as a ‘Jewish state’ for the legal status of the Jewish religion in Israel, the Jewish religion has been established in the state through laws granting legal status to Jewish religious authorities in several areas, the most important of which being that of personal laws. This establishment originates in the pre-state era and in the need of the leaders of the Zionist movement to secure the support of the Orthodox religious factions within the Jewish community for the establishment of the Jewish state, and has come to be known as the ‘Status Quo’.²¹ Some argue that this partial establishment was also motivated by the need of the new Zionist secular regime to gain legitimization by maintaining a connection with the Jewish past.²² Be that as it may, the Israeli model which from the onset has

¹⁸ Basic Law: Human Dignity & Liberty, 1992, S H 1391, 60, <<http://www.mfa.gov.il/mfa/go.asp?MFAH00hi0>> accessed 10 October 2012. See also, Basic Law: Freedom of Occupation, 1994, S H 1454, 90, <<http://www.mfa.gov.il/mfa/go.asp?MFAH00hj0>> accessed 10 October 2012.

¹⁹ The Declaration of Establishment of the State of Israel (Israel, 14 May 1948) <<http://www.mfa.gov.il/mfa/go.asp?MFAH00hb0>> accessed 10 October 2012.

²⁰ See Avigdor Levontin, ‘“Jewish and Democratic” – Personal Reflections’ in Yossi David (ed), *The State of Israel: Between Judaism and Democracy* (The Israeli Institute for Democracy 2000) 251 (taking a position against interpreting the term Jewish in the Basic Laws as including the Jewish religion). See cf Menahem Alon, ‘Constitution by Legislation: The Values of a Jewish and Democratic State in Light of Basic Law: Human Dignity and Personal Freedom’ (1993) 17 *Iunei Mishpat* 659, 668–70 (taking a position supporting the inclusion of the Jewish religion in the term ‘Jewish’).

²¹ Daphne Barak-Erez, ‘Law and Religion Under the Status Quo Model: Between Past Compromises and Constant Change’ (2009) 30 *Cardozo Law Review* 2495.

²² Yonatan Shapira, ‘Secular Politicians and the Status of Religion in the State of Israel’ in Menachem Mautner and others (eds), *Multiculturalism in a Democratic and Jewish State, the Ariel Rosen-Zvi Memorial Book* (Ramat Publishing - Tel Aviv University 1998) 661.

given preference to the Orthodox Jewish religion deviates from the classic liberal model which aspires to treat all religions equally and neutrally, and which was adopted in both the United States and Germany. This deviation has important consequences for the preservation of pluralism in Israel and can explain the willingness of the Israeli Supreme Court to tackle certain types of religion cases.

The most important aspect of the partial establishment of Orthodox Judaism is that all Jews in Israel are subject to Jewish religious personal laws. At the same time, it is important to note that members of other recognized religious communities such as Muslims and various Christian denominations are also subject to the personal religious laws of their particular religions.²³ The imposition of the religious personal laws of the various religious communities on all residents, and the lack of an alternative civil marriage, constitutes a violation of the right to freedom of conscience and belief, as well as a violation of the rights of women who are subject to the discriminatory patriarchal religious laws of the various religious communities.²⁴

While establishing an exclusively religious system of laws in matters of marriage and divorce is probably the most serious entanglement of religion within the Israeli state, there are several other areas in which religion, and in particular the Orthodox Jewish religion, is given a preferred status by the state, either through statutes or through administrative decisions, which confer to it state power as well as money. Thus, the state has established a chief rabbinate and has given full control over it to Orthodox Judaism.²⁵ The chief rabbinate is a powerful state organ which enjoys large budgets and which controls the religious services given by the state to the Jewish population. Some of the state and municipal institutions established and financed by the state and subject to the religious authority of the Chief Rabbinate are the rabbinical courts that deal with matters of marriage and divorce of Jews in Israel, the regional religious councils which deal with the supply of religious services—such as burial (public cemeteries in Israel are overwhelmingly religious), synagogues, kashrut, etc—to Jews on a regional basis, and the conversion courts which deal with conversion to Judaism.²⁶ It is important to note that the laws erecting the state's religious establishment are silent on the question what stream of Judaism should control this establishment. Throughout the years the control over the religious establishment has been held by Orthodox Judaism and determined through political power struggles between the Orthodox and ultra-Orthodox streams.

Another important area in which Orthodox and ultra-Orthodox Judaism are given preferential treatment by the state is the area of education, were the state has established a fully funded Orthodox religious public education system,

²³ The authority of the various religious communities was established through legislation from the period of the British Mandate that was later incorporated into Israeli law, Sign 51 (1) of the King's Order in Council, 1922. The detailed authority of the Jewish Rabbinical Courts is set out in the Jurisdiction of Rabbinical Courts (Marriage and Divorce) Act 1953. The detailed authority of the Muslim religious courts can still be found in Sign 52 of the King's Order in Council (1922).

²⁴ See eg, Frances Raday, 'On Equality' in F Raday and others (eds), *Women's Status in Israeli Law and Society* (Schocken Publishing House 1995) 19.

²⁵ The Chief Rabbinate of Israel Law, 1980, SH 965, 90.

²⁶ The Jewish Religious Services Law, 1971, SH 628, 130.

alongside the secular public education system.²⁷ In addition, the state recognizes the existence of autonomous ultra-Orthodox religious schools, which have almost complete autonomy in choosing their curriculum, while at the same time being heavily funded by the state.²⁸ While many of these arrangements have originated in the aforementioned ‘Status quo’, they have been shaped and reshaped over the years by the struggles between, on the one hand, Orthodox and ultra-Orthodox interests, represented by powerful Orthodox and ultra-Orthodox political parties, and, on the other hand, secular and non-Orthodox interests.²⁹

Although this is not an exhaustive list of the ways in which the state of Israel has entangled itself with religion, it suffices to demonstrate the depth and the width of this entanglement, which creates a permanent tension between the state’s commitment to liberal values such as equality, liberty and pluralism, and its commitment to an Orthodox and even ultra-Orthodox version of Judaism. Legislative supremacy and the structure of the Basic Laws Human Dignity and Freedom of Occupation strictly limit the ability of the Israeli Supreme Court to defend equality, liberty and pluralism in matters in which legislation explicitly denies them, such as matters of marriage and divorce.³⁰ However, as we will see, the court has tried over the years to advance equality, liberty and pluralism in those areas in which the preference to Orthodox Judaism is not inscribed in statutes. It has done so by espousing a doctrine which I will term egalitarian pluralism, which requires the state, if it chooses to allocate budgets or other public goods to a certain religious denomination, to equally support other existing denominations. This doctrine was also partially, though I will claim insufficiently, applied to the allocation of public space to minority groups, in the face of religious objections to such allocation by powerful Orthodox and ultra-Orthodox religious groups. I will argue that because the entanglement between the Orthodox Jewish religion and the state is so extensive, and Orthodox and ultra-Orthodox groups have so much political power and influence, the only way to maintain Israel’s commitment to equality, liberty and pluralism is by applying the doctrine of egalitarian pluralism not only to state action, but also to semi-private actions by these religious groups, such as education.³¹ While the court has tried to do that in a recent case that will be discussed below, its attempts have been circumvented by the state.

Thus, I will claim that the deliberate entanglement with the state that the Orthodox and ultra-Orthodox groups have sought, in terms of state power and

²⁷ The State Education Law, 1953, SH 131, p 137.

²⁸ See *ibid* and also Unique Cultural Education Institutions Law, 2008, SH 2173, 742.

²⁹ See Barak-Erez (n 21).

³⁰ While the court can annul Knesset legislation that infringes the Basic Laws on human dignity and liberty and on Freedom of Occupation, this ability has been explicitly limited by the Basic laws. Basic Law Human Dignity and Liberty has an immunity clause which states that all Knesset legislation enacted prior to the enactment of the Basic Law shall not be subject to its provisions. One of the main reasons for this immunity clause was to prevent the Basic Law from annulling the religious laws of marriage and divorce. Basic Law Freedom of Occupation does not have an immunity clause, but it has an override clause which enables the Knesset to pass laws that infringe on the right to freedom of occupation under certain conditions. This clause was added to the Basic law in order to enable the Knesset to pass a law prohibiting the importation of non-Kosher meat into Israel despite the fact that such a prohibition infringes on the right to freedom of occupation.

³¹ In the Israeli context intra-group education is merely semi-private because as already mentioned, it is in lieu of public education and is heavily financed by the state.

budget allocation, and have so successfully obtained over the years, should necessarily subject them to compliance with some liberal norms such as non-discrimination and tolerance, if Israel is to maintain its dual commitment as a Jewish and democratic state. In this respect the entanglement of Orthodox Jewish religion in the state and the disregard the state has shown, and is still showing, to the consequences this entanglement has in terms of the violation of the rights to equality and liberty of other groups, forces the Israeli Supreme Court to be an activist court in this area and to take measures which might be seen by some as restricting the religious liberty of some religious communities. While in other western democracies the protection of pluralism can perhaps be guaranteed through the 'hands off' approach to pluralism which gives each religious community the freedom to conduct its own way of life without state interference,³² the only way to ensure pluralism under conditions such as those obtaining in Israel is by actively pursuing an egalitarian pluralism which actively strives to ensure equality both at the state and at the semi-private intra-group level.

4. *The Israeli Supreme Court and Egalitarian Pluralism*

A. *An Egalitarian Pluralist Approach to the Allocation of Budgets*

The origins of the egalitarian pluralist approach in the jurisprudence of the Israeli Supreme Court, and its most prominent example, comes from the area of the allocation of public funds to religious organizations. For many years the government allocated large sums of money to Orthodox and ultra-Orthodox religious organizations, which were backed by powerful Orthodox and ultra-Orthodox politicians, without any supervision and without regard to the need to apply equal, non-arbitrary and transparent criteria when allocating public funds to non-state institutions. Following court criticism of this practice the Knesset added in 1992 section 3A to the Budget Foundations Law, which requires the government to allocate public funds to non-state institutions according to egalitarian criteria.³³ However, far from resolving the problem, the enactment of section 3A has spurred numerous petitions to the court, mostly by non-Orthodox institutions claiming that they were discriminated against in the allocations of funds contrary to the law. These petitions have obliged the court to determine the meaning of the term 'egalitarian criteria' with respect to budget allocations.

One of the central cases that discussed such a claim of discrimination was the *Conservative Movement* case.³⁴ In this case the Jewish Conservative Movement petitioned the Supreme Court against the Ministry for Religious Affairs, for its refusal to recognize the Conservative Movement as an organization that acts to promote Jewish religious culture and that is therefore entitled to the allocation of state funds for its activities in this area. According

³² Eg the *Yoder* case (n 3).

³³ Budget Foundations Law, 1985.

³⁴ H.C. 1438/98b. *The Conservative Movement v The Minister for Religious Affairs* (1999) 53(5) PD 337.

to the petitioners the Ministry for Religious Affairs refuses to fund its activities due to discrimination on the basis of religious affiliation, because the movement is 'a non-Orthodox organization whose character and ideas are not accepted by most of the people working for the Ministry of Religious Affairs'.³⁵ In an opinion by Justice Zamir the court granted the petition holding that the freedom of religion, like other freedoms, has two faces: liberty and equality. Thus, freedom of religion gives any individual or group the freedom to choose her religious beliefs for herself. At the same time the freedom of religion prohibits any government body from discriminating on the basis of religious views. This prohibition also applies to the Ministry for Religious Affairs, whose aim should be to assist in providing the religious needs of citizens of different religions and of different religious denominations without discriminating on the basis of religious affiliation.³⁶

The court agreed with petitioners that not only is the state forbidden to discriminate against them in budget allocations because their religious beliefs are different, but that the fact that their beliefs were different actually strengthened the obligation that the state had to support them. According to the court:

in a democratic society different groups, including rejected minority groups, have the right to express themselves culturally and religiously, each in its own way. Each man will live by his faith. Furthermore, it is an advantage for society that it has a diversity of beliefs, ways of life, and institutions. Diversity enriches. It reflects the reality of life; it contributes to the improvement of life; it gives practical meaning to freedom. Freedom is choice. Without the possibility of choosing between different ways, man's freedom to choose his way is but an empty phrase. This is the essence of pluralism, which is an essential and central component of a democratic society, not just in politics but also in culture and in religion: a diversity of ways and the option to choose from them.³⁷

Thus, the court held, pluralism, which in a democratic society is a derivative of both freedom and equality, required the state to support not only Orthodox religious culture but non-Orthodox religious culture as well.³⁸ It is important to observe that similarly to 'hands off' pluralism egalitarian pluralism does not require the government to support any religion. However, while 'hands off' pluralism presupposes that religious organizations are not supported by the state and is therefore indifferent to egalitarian concerns, egalitarian pluralism applies under conditions of an already existing government support for religion and demands that this support be distributed fairly.

While henceforth the court recognized the importance of the principle of egalitarian pluralism it has in some cases interpreted it more narrowly than it might have, and allowed the state to continue to allocate budgets overwhelmingly to Orthodox and ultra-Orthodox institutions at the expense of non-Orthodox and secular institutions. This has been most evident in two cases in which secular and non-Orthodox organizations petitioned the court claiming that the Ministry of Education is discriminating against them in the

³⁵ *ibid* s 27 to Justice Zamir's opinion.

³⁶ *ibid*.

³⁷ *ibid* s 29 to Justice Zamir's opinion.

³⁸ *ibid*.

allocation of budgets for Jewish studies in contravention of the law and of the principle of pluralism.³⁹

The petitioners in the first case, 15 secular and non-Orthodox organizations, presented the court with data that showed that while Orthodox and ultra-Orthodox organizations receive 99.5% of the budget allocated by the ministry for the support of Jewish studies, non-Orthodox and secular organizations receive together merely 0.5% of the budget.⁴⁰ The Ministry of Education argued in return that it distributed the budgets to any organization that met the uniform criteria set out by the ministry, and that the disparity stemmed from the fact that the organizational structure of the non-Orthodox and secular organizations did not fit these criteria. In response, petitioners claimed that the overwhelmingly disparate impact of the ministry's criteria clearly points to discrimination against petitioners due to their religious beliefs and that not addressing this discrimination would turn the principles of egalitarian pluralism to a dead letter law. Nevertheless, the Supreme Court refused to intervene and rejected the petition holding that it was not persuaded that the criteria were intentionally set so as to deprive petitioners of budgets, and that although the state is bound by the principle of pluralism, petitioners cannot expect the state to change its criteria so as to suit the organizational structure of secular and non-Orthodox organizations.⁴¹

Similarly, in the second case petitioners have shown that a major disparity exists between the budget allocated to Orthodox and ultra-Orthodox organizations for the purpose of enhancing the study of Judaism in schools on the one hand (95% of the budget), and the budget allocation for non-Orthodox and secular organizations for the same purpose (5% of the budget). Just as in the previous case, here too the petitioners claimed that the Ministry of education carved out the criteria for the allocation of the budget in such a way as to suit Orthodox and ultra-Orthodox organizations and schools and to leave out secular and non-Orthodox organizations and schools. After emphasizing the importance of the principle of pluralism for a diverse society such as Israel, and after acknowledging that disparate impact can be grounds for a finding of wrongful discrimination, the court rejected this petition too, due to the absence of a showing of discriminatory motives in the decisions of the Ministry with regard to the criteria for budget allocations.⁴²

Unfortunately, these decisions indicate that the commitment of the Supreme Court to the principle of egalitarian pluralism in the allocation of budgets is only partial. Allegedly, even without espousing the principle of pluralism the court could have struck down the criteria for the budget allocation in these cases since the case law of the Israeli Supreme Court unequivocally supports striking down discriminatory government actions on the basis of their disparate impact even absent a showing of discriminatory intent.⁴³ But, moreover, in the context of budget allocations discussed above the court has held that the duty

³⁹ HC 1447/03, *Panim et al. v Ministry of Education et al.* (2004) (hence—Panim I); HC 11020/05, *Panim et al. v Ministry of Education et al.* (2006) (hence—Panim II).

⁴⁰ Panim I, s 8.

⁴¹ *ibid* s 31–4.

⁴² Panim II (n 39) ss 20–1.

⁴³ See *eg* HC 11163/03, *The Arab Higher Monitoring Committee et al. v The Prime Minister of Israel* (2006).

of non-discrimination stems not only from the principle of equality but also from the principle of pluralism which, in a diverse society such as Israel, requires the government to recognize and to equally support the various denominations of Judaism and not merely the Orthodox and ultra-Orthodox ones. The court should have interpreted this duty of the government as a proactive duty, which requires the government to make any reasonable effort to enable the various denominations to receive budget allocations, even if this necessitates changing the criteria of allocation.⁴⁴ Nevertheless, in these cases the court shied away from doing that, enabling the ministry of education to continue favouring Orthodox and ultra-Orthodox organizations in the allocation of funds.

A shift in that direction, signalling the court's willingness to closely scrutinize budget allocations in order to determine whether their disparate impact is discriminatory or not, can be detected in the more recent case of the *Open House for Gays and Lesbians in Jerusalem v the Jerusalem Municipality*.⁴⁵ As will be further elaborated below, due to the large Orthodox and ultra-Orthodox population residing in Jerusalem there are continuous attempts by these communities as well as by the Jerusalem municipality itself—in which these communities have strong representation—to circumvent any activities initiated by the gay community in Jerusalem. An important aspect of these attempts is the continuous refusal of the Municipality to fund any activities initiated by the Open House for the benefit of the gay residents of Jerusalem. The municipality justified this refusal by claiming that the activities for which the funding was requested did not meet the neutral criteria that the Municipality set. The Supreme Court rejected this claim deciding that gays and lesbians should be regarded as a suspect classification in Israeli law and that budget allocations that have a disparate impact on them must be closely scrutinized.⁴⁶ After close scrutiny of the Jerusalem municipality's criteria for budget allocations to community activities in Jerusalem, the court found that the criteria discriminated against gays and lesbians and ruled that the principles of equality and pluralism require the expansion of the existing criteria in such a way as to allow for the inclusion of the Open House in the municipal budget allocations.⁴⁷ It is to be hoped that in the future the court will apply similarly close scrutiny to budget allocations for religious and cultural programmes that have a disparate impact on non-Orthodox and secular organizations, and require state authorities to change the discriminatory criteria in order to achieve an egalitarian and pluralist outcome.

B. An Egalitarian Pluralist Approach to the Allocation of Public Space

Life in a heterogeneous and deeply divided society raises conflicts not only with regard to the allocation of public budgets but also with regard to the allocation

⁴⁴ In the recent case of HC 11585/05, *The Movement for Progressive Judaism v The Ministry for Absorption of Aliyah* (19 May 2009) the court has mentioned the active aspect of the commitment to pluralism (s 17)

⁴⁵ AAP 343/09 *Open House for Pride and Tolerance in Jerusalem v the Jerusalem Municipality* (14 September 2010).

⁴⁶ For a description of the many court cases on the subjects see *ibid* at ss 4–27 to justice Amit's ruling. On Gays and Lesbians as a suspect classification in Israeli law see ss 53–9 to justice Amit's ruling.

⁴⁷ *ibid* at s 71 to justice Amit's ruling.

of public space. With respect to the role of religion in the state and the place of religious communities such conflicts can arise when religion, or the rights and interests of religious groups, are used to prevent other groups, either religious or non-religious, from using the public space. In this context, I will discuss two controversies that have been brought before the Israeli Supreme Court—one surrounding the right of gays and lesbians to hold an annual pride parade in Jerusalem, and the other surrounding the right of a group of Jewish religious women (which includes both Orthodox and non-Orthodox women who have come to be known as Women of the Wall—WoW) to pray at the Western Wall according to their own custom which includes reading from the bible and wearing prayer shawls (Talitot). Neither of these controversies was decided on the basis of the principle of egalitarian pluralism. I will claim that this is unfortunate, and that, at least with respect to the WoW cases, an application of the principle of egalitarian pluralism to these cases would have led to a different, and more just, result.

In 2006, after the pride parade has been held annually in Jerusalem for several years, several petitions were brought before the Supreme Court against the authorization granted by the chief of police to the gay and lesbian organization ‘Open House’ to hold the parade in Jerusalem that year.⁴⁸ The petitioners argued that holding a pride parade in Jerusalem contravenes the nature of Israel as a Jewish state, that there is strong opposition to the parade by representatives of all religions (Orthodox Judaism, Islam and Christianity), and that holding the parade will deeply hurt the feelings of the large Jewish ultra-Orthodox and Orthodox population that resides in Jerusalem. Petitioners also threatened that if held the pride parade might cause strong violent reactions and lead to bloodshed.⁴⁹ The legal doctrine applied by the court in rejecting the petition was the established doctrine of freedom of speech and of the right to demonstrate. According to the court, freedom of speech and the right to demonstrate are both fundamental rights that shall only be restricted if their restriction is necessary to prevent serious harm to the public interest and only as a last resort.⁵⁰ In this case the court rejected the claim that holding the parade would endanger public peace, because the threat to public peace stemmed from the petitioners themselves and the groups they represented (ultra-Orthodox and Orthodox Jews and the religious right), which announced that if the parade will be allowed to go through they might riot and resort to violence. According to the court, preventing the parade because of such threats, amounts to giving a prize to those who are willing to resort to violence and to disregard the law in order to achieve their goal.⁵¹

With regard to the claim that allowing the parade to take place in Jerusalem will deeply hurt the feelings of the ultra-Orthodox and Orthodox population the court repeated another of its established doctrines according to which in cases of conflict between freedom of speech and the need to protect the feelings of others, freedom of speech will be restricted only where there is a high

⁴⁸ HC 8988/06, *Meshi Zahav v Franco, Chief of Jerusalem Police* (2006).

⁴⁹ *ibid* s 4.

⁵⁰ *ibid* ss 9–10.

⁵¹ *ibid* s 11.

likelihood that not restricting the speech would cause a deep and serious harm to public feelings, including to religious feelings. Thus, restrictions on free speech will be approved only in extreme cases where the harm to the feelings is of such magnitude that it would shake the foundations of a democratic society.⁵² The court was willing to assume that holding the parade in Jerusalem would indeed hurt the feelings of the ultra-Orthodox and Orthodox population in Jerusalem. However, it held that the emotional injury experienced by these groups would not be of such magnitude as to justify placing restrictions on the freedom of demonstration in a pluralistic democratic society. This was especially true, held the court, in light of the fact that due to lack of a sufficient police force to protect the parade (because of other security concerns that were occupying the police at that time), the organizers have agreed not to hold a parade in the streets of Jerusalem, but instead to only hold a gathering in a closed stadium, far from the city centre, and to make sure that the event would be modest and non-provocative.⁵³

A year later, when the other security concerns that have engaged the police at the time of the 2006 parade have lessened, the organizers of the parade were again permitted to hold it as a street parade. A new petition was filed to the Supreme Court by the same petitioners arguing for similar reasons that the 'Open House' should not be allowed to hold a street parade, but should be restricted to the closed gathering to which they agreed in the previous year.⁵⁴ The court rejected the petition on similar grounds to those it gave a year before, holding that having a parade through the streets of Jerusalem does not constitute a sufficient injury to the feelings of ultra-Orthodox and Orthodox groups that would justify prohibiting the parade, in light of the fact that the route of the parade was far from ultra-Orthodox and Orthodox neighbourhoods and that the organizers have once again agreed to make sure that the event will be modest and non-provocative.⁵⁵

While the court mentioned only in passing in these decisions the fact that Israeli society is a pluralist society, this consideration played an important role in its decisions. The court has also stressed that the pride parade was a parade held by a minority group (gays and lesbians) and that its purpose is to assert the right of this minority group to equality and to human dignity.⁵⁶ Thus, this conflict is an example of a case in which powerful religious groups demand the silencing of the claim of a minority group to equality, on the basis of their religious prejudices regarding homosexuality. From the perspective of egalitarian pluralism, such a demand cannot be accepted, because it undermines the principle of equality, which all citizens must accept in the public sphere. Furthermore, petitioners tried to argue that the parade should not be held in Jerusalem because of the large numbers of Orthodox and ultra-Orthodox who live in it. In fact, the mayor of Jerusalem at the time was himself an ultra-Orthodox, who objected to holding the parade in Jerusalem.⁵⁷ Thus, the

⁵² *ibid* s 13.

⁵³ *ibid* s 14.

⁵⁴ HC 5277/07, *Marzel v Chief of Jerusalem Police* (2007) s 5.

⁵⁵ *ibid* s 7.

⁵⁶ *Meshi Zahav* (n 48) s 11.

⁵⁷ *Marzel* (n 54) s 8.

religious residents of Jerusalem tried in essence to argue that the fact that there was a large number of religious residents in Jerusalem has turned the whole city into a semi-private space in which their sensibilities should be given precedence over the rights of others. The court rejected this position, stating that if the parade organizers would have tried to organize a parade through Jerusalem's ultra-Orthodox neighbourhoods, this would have been an act of intolerance on their part that would unduly offend the sensibilities of the ultra-Orthodox residents and would therefore be forbidden.⁵⁸ However, merely holding the parade in Jerusalem, which is also the home of many gays and lesbians, and the capital of Israel, cannot be considered unduly offensive. Hence, while ultra-Orthodox residential areas may be considered semi-private spaces in which the interests of the residents may justify narrowing the demands of egalitarian pluralism, the city of Jerusalem as a whole cannot.

The second controversy over the allocation of public space which I wish to discuss, concerns prayer arrangements at the Western Wall. The controversy arose when a group of Orthodox and non-Orthodox women who have come to be known as WoW wanted to pray at the Wall, while wearing prayer shawls and reading aloud from the bible. While there is no explicit prohibition on women to pray this way in the Halacha, among Orthodox and ultra-Orthodox Jews in Israel it is commonly believed that this form of praying should be reserved strictly to men, and that women should neither wear Talitot nor pray out loud. After the women were forbidden to pray according to their custom by the Rabbi in charge of the Wall, and suffered continuous attacks at the hands of Orthodox and ultra-Orthodox believers during their prayers, they filed a petition to the Israeli Supreme Court requesting it to issue an order to the Rabbi of the Wall instructing him to allow the women to pray according to their own custom, and instructing the police to protect them from the attacks by the other believers.⁵⁹ In addition, the petition was directed against a regulation issued by the Minister of religious affairs in response to the women's attempts to pray at the Wall. According to the regulation, anyone who conducts a religious ceremony in a holy site in contravention of the 'custom of the place', and thereby hurts the feelings of the other believers will be subject to imprisonment and a fine.⁶⁰ Petitioners argued that preventing them from praying at the Wall according to their own custom unduly infringes on their right to freedom of religion, and that the regulation and the actions of the authorities against them were therefore illegal. While two of the three justices expressed sympathy with the petitioners cause—stating that the appropriate solution should be to find a way for everybody to pray at the wall together, each according to his or her own beliefs, in a spirit of tolerance and pluralism—the court denied the petition, instructing the government to establish a committee to find ways to enable the women to access the Wall without hurting the feelings of other believers.⁶¹

⁵⁸ *ibid* s 8.

⁵⁹ HC 257/89, *Hofman v The Superintendent of the Western Wall* (1994) (henceforth WoW1). This decision was followed by two additional decisions: HC 3358/95, *Hofman v CEO of the Office of the Prime Minister* (2000) (henceforth WoW2) and HC 4128/00, *CEO of the Office of the Prime Minister v Hofman* (2003) (henceforth WoW3).

⁶⁰ S 2(a)(1a) of the Regulations for the Preservation of the Jewish Holy Sites, 1981.

⁶¹ WoW1 (n 59) at s 3 to Justice Shamgar's opinion; s 6 to Justice Levin's opinion.

For several years three committees have discussed the issue and contrary to the recommendation of the WoW1 court recommended that the WoW not be allowed to pray by the Western Wall, because such prayer might cause serious violence on the part of other believers whose feelings would be deeply hurt by the WoW's different customs. The committees also put a strong emphasis on the 'custom of the place' denying the WoW's right to pray in a manner that deviated from this custom.⁶² As a result of the discrepancy between the instructions of the WoW1 court and the recommendations of the committees, the court found itself forced to decide a second petition filed by the WoW, in which they again requested it to order the government to make the necessary arrangements to allow them to pray according to their own custom at the Western Wall. In this second decision the court criticized the committees for overstepping their mandate, which was to find ways to enable the women to pray at the wall itself, and for giving too much weight to considerations such as the custom of the place, the feelings of the other believers and their threats to resort to violence if the WoW are allowed to pray at the Wall.⁶³ The court held unanimously that the WoW had a right to pray at the Wall and ordered the government to set the necessary arrangements for the fulfilment of this right within six months.⁶⁴

This decision received strong negative reactions from the religious political parties as well as from the government, who requested a rehearing. Despite the fact that the decision in the WoW2 case was unanimous, and it only reiterated the substantive judgment of the WoW1 majority, the request for a rehearing was granted. The rehearing was held before a panel of nine justices, and by a majority of five to four the court decided for the government, holding that the government should, within 12 months, prepare an alternative site in which the WoW could pray, in an archeological site near the Wall called the Robinson Arch.⁶⁵ It is important to note that the section of the Wall next to the Robinson Arch is not part of the prayer area of the Wall and is not considered as sacred as the prayer area itself.⁶⁶ Since that decision the WoW are forbidden from praying by the Wall according to their custom and can only do so at the Robinson Arch.

Despite the fact that WoW3 was a rehearing held before nine justices it contained almost no substantive discussion of the rights involved in the case. The WoW's claim that their right to sex equality was being violated was not even mentioned in the various judgments, and the right to freedom of religion was only referred to through references to the previous judgments in the case. I would argue that the court's final decision in the WoW cases represents a serious deviation from the court's usual stance which insists on promoting religious pluralism and equality, and that the decision represents the court's surrender to the political pressures of the Orthodox and ultra-Orthodox political parties and to the government, in contravention of its own jurisprudence.

⁶² WoW2 (n 59) ss 1–21.

⁶³ *ibid* s 26.

⁶⁴ *ibid* s 30.

⁶⁵ WoW3 (n 59) at s 48 to Justice Cheshin's judgment.

⁶⁶ *ibid* at s 42 to Justice Cheshin's judgment.

Thus, the court put undue emphasis on the hurt feelings of the other believers, and instead of condemning the argument that the WoW should not be allowed to pray at the Wall because their presence there would bring the other believers to resort to violence against them, made this argument the linchpin of its judgment. Furthermore, the second linchpin of the court's judgment—the argument that the WoW's mode of praying was contrary to the custom of the place—was similarly misplaced, giving the majority an absolute right to exclude the minority from the most important national religious monument of the Jewish people.

Had the court in this case applied the logic of egalitarian pluralism which it had applied in the cases discussed above, it should have ruled that not allowing the WoW to share the public space and pray according to their custom at the Wall is a violation of both their religious freedom and their right to equality (both to sex equality and to equality as a religious minority). According to this logic, which is similar to that applied in the *Conservative Movement* case discussed earlier, not only is the state forbidden to discriminate against the WoW due to their different beliefs but the difference in their beliefs actually strengthens the obligation of the state to accommodate them, because as the court noted in the *Conservative Movement* case, diversity enriches, it reflects the reality of life and gives practical meaning to freedom.⁶⁷ Such accommodation could, for example, have been achieved through a re-allocation of the existing prayer area at the Wall. While currently the entire area is reserved for prayers conducted according to Orthodox custom and is segregated by sex, the re-allocation of a portion of the prayer area to non-Orthodox and mixed sex prayer could have resolved this issue, as well as the desire of Reform Jews to conduct mixed sex prayers at the Wall. However, instead of protecting and accommodating diversity at the Western Wall the court decided that the fact that the WoW deviate from the custom of the place and that this deviation might cause others to resort to violence against them is reason enough to prevent their equal access to the Wall.

One could object to the analysis suggested above by claiming that the Western Wall is not like any other public space but is more like a synagogue in which the believers have a right to expect that only people who are willing to respect their own customs would be allowed to enter. This argument was indeed used by respondents to justify their position and even adopted by some of the judges.⁶⁸ If indeed the Western Wall is viewed as an Orthodox/ultra-Orthodox synagogue then requiring Orthodox/ultra-Orthodox believers to accommodate non-Orthodox rituals in their synagogue might from a liberal perspective be considered a serious violation of their right to religious liberty and to religious autonomy. However, I would argue that this objection should be rejected and that it serves to explain why in the current state of affairs the court has to take an active role in enforcing egalitarian pluralism, and why such an enforcement will not be a violation of religious liberty, but an enhancement of it.

⁶⁷ *The Conservative Movement* case (n 34) at s 29 to Justice Zamir's opinion.

⁶⁸ *See eg* WoW3 (n 59) at s 10 to justice England's Judgment.

As was reiterated by some of the justices in the WoW decisions, the Western Wall is not merely a religious monument but a national monument of very high importance to the Jewish people as a whole, and as such it should be open to all Jews regardless of their religious denomination, and to secular activities as well as to religious activities.⁶⁹ Nevertheless, despite the fact that the Wall is as much a national monument as a religious monument, its management was entrusted by law to Orthodox Rabbis appointed according to the recommendation of the Orthodox chief rabbinate.⁷⁰ Unfortunately, these rabbis did not see it as their duty to manage the Western Wall to the benefit of all Jews, as befitting public servants in charge of a public national monument, but preferred to understand the position entrusted to them by law as allowing them to turn the Western Wall into an exclusively Orthodox and ultra-Orthodox prayer area, in which the strict religious rules of Orthodox Judaism are enforced, including the separation between men and women during prayer, insistence on modest clothing for women, and the observance of Orthodox customs of prayer. In this way they have in effect prevented other Jewish religious denominations from conducting prayers at the wall, and have caused many secular Jews, who object to separation of the sexes and to the imposition of modest clothing on women to stay away from the Wall altogether.⁷¹

This is but one example of how Orthodox and ultra-Orthodox political and institutional power is being used, with the sanction of the state, to appropriate public spaces and public funds for the benefit of Orthodox and ultra-Orthodox interests, and to impose Orthodox and ultra-Orthodox religious doctrine on the non-Orthodox and secular population. Because both the government and the Knesset are for political reasons most often complicit in these actions, it is left to the court to strictly apply a doctrine of egalitarian pluralism which checks the discriminatory use of power and funds by Orthodox and ultra-Orthodox public servants and political representatives and ensures that public space and public funds are distributed equally and with equal regard to the religious freedom of all. Thus, far from jeopardizing the Jewish nature of the state, the application of egalitarian pluralism will enhance it by preventing discrimination between Jews and will enable Israel to be true to its commitment to all Jews.

C. An Egalitarian Pluralist Approach in the Semi-private Sphere of Religious Education

Thus far we have discussed the application of egalitarian pluralism to decisions which concern the allocation of public funds and public spaces. In this type of cases there can be little objection, at least from the liberal perspective, to the court's interference in order to ensure a more egalitarian and pluralistic allocation. However, the question of interfering in the semi-private sphere of a

⁶⁹ *Eg* ss 1–3 to Justice Levin's Judgment and s 2 to Justice Shamgar's Judgment in WoW1 (n 59).

⁷⁰ S 1 of the Regulations for the Preservation of the Jewish Holy Sites, 1981.

⁷¹ Similarly, Reform and Conservative Jews who want to conduct non-sex segregated prayers at the Wall are unable to do that, although it is quite unclear why it is that there is no section along the wall in which men and women can stand together, in addition to the two segregated sections that currently take up the whole length of the Wall.

religious community—the education of children—can raise a whole host of objections from the liberal perspective and claims regarding the violation of religious freedom and of religious autonomy. In the example which will be discussed below, the Israeli Supreme Court held that the state must intervene in ultra-Orthodox education to ensure that ultra-Orthodox schools teach the core curriculum and do not restrict the curriculum to the study of religious texts. I would argue that while liberal objections to such interference may have some merit in other cases, in the Israeli context two important facts must be taken into account when assessing the legitimacy of the court decisions. One is the position of the ultra-Orthodox community within Israeli society and the other is the extensive funding that the state gives even to allegedly private ultra-Orthodox schools in Israel.

First I will address the position of the ultra-Orthodox community within the Israeli polity. It is often argued that the ultra-Orthodox community is a minority community that suffers from discrimination and from an erosion of its unique way of life and as such should be given multicultural accommodations by the government.⁷² Nevertheless, in the discussion thus far we have seen that the Orthodox and ultra-Orthodox Jewish religion is given a preferred status in the state through the grant of government power and extensive state funds. The Orthodox and ultra-Orthodox public servants appointed by their respective political parties to positions in state organs such as the chief rabbinate or the Western Wall Authority, to different government ministries, such as education, religious affairs and interior, and to local government, use their positions to maintain and enhance this preferred status. In addition, the Orthodox and even more so the ultra-Orthodox communities and their representatives, motivated by religious illiberal precepts, try, and at times succeed, to circumvent the grant of equal rights to unpopular minorities such as homosexuals or the WoW, even through the use of force or by the threat of using it. Thus, as justice Cheshin opined in the Supreme Court case dealing with the constitutionality of the exemption of tens of thousands of ultra-Orthodox youths from compulsory military service, in view of the strong position of the ultra-Orthodox community in the Israeli polity, it is highly questionable whether it should be considered a secluded and powerless minority which is entitled to special constitutional protection.⁷³

In his opinion Justice Cheshin draws a comparison between the ultra-Orthodox in Israel and the Amish in the United States. Referring to the rationale behind the *Wisconsin v Yoder* case, in which the US Supreme Court exempted the Amish from two years of compulsory education, Justice Cheshin explains that if such an exemption is legitimate it is in light of the secluded nature of the Amish, who are a very small minority that lives strictly according to its religious precepts, in total seclusion from the outside world, even refusing to accept public welfare benefits from the state.⁷⁴ Conversely, the ultra-Orthodox in Israel, explains Cheshin, are a very different type of

⁷² Gila Stopler, 'Contextualizing Multiculturalism – A Three Dimensional Examination of Multicultural Claims' (2007) 1 Law and Ethics of Human Rights 309–53.

⁷³ HC 6427/02, *The Movement for Quality Government in Israel et al v The Knesset et al* (2006).

⁷⁴ *ibid* at s 53 to Justice Cheshin's opinion.

community—they constitute a much larger portion of the Israeli population; they themselves do not comprise a single community but a conglomeration of different communities, only a small portion of which are truly secluded from the rest of Israeli society; most of them form an integral part of Israeli society—they vote to the Knesset and in local elections, they have significant representation in the Knesset, in local government and in the public service; they receive a large share of financial benefits from the state; their representatives in the government, in the Knesset and elsewhere make important decisions regarding the country's priorities, its policies and the allocation of its resources, which affect every citizen in the state.⁷⁵ Under such conditions, opines Justice Cheshin, it is discriminatory and undemocratic to give tens of thousands of ultra-Orthodox youths an exemption from compulsory military service when others are not exempted.

Similarly, I would argue that under such conditions it is even more problematic to view the ultra-Orthodox education system as a private communal education system and give it an exemption from teaching ultra-Orthodox children the core curriculum. Allowing the ultra-Orthodox community not to teach its boys any civic education and any basic skills would jeopardize the fundamental interest of the state in maintaining a pluralistic, tolerant, egalitarian and democratic society, as well as the state interest in economic sustainability and the rights of the ultra-Orthodox children themselves. Furthermore, the fact that the state gives extensive funding to ultra-orthodox schools thereby helping their expansion, both increases the harm to the public interest emanating from their refusal to teach the core curriculum, and increases the right of the state to require their schools to abide by its basic demands.⁷⁶ Nevertheless, the court's attempts to enforce these requirements encountered not only strong opposition from the ultra orthodox community itself, but also active opposition from state organs and state officials. Since the case includes more than one decision and many extra judicial developments, I will discuss it only to the extent that is required to emphasize the egalitarian pluralistic approach that the court took and the reactions to it.

Israel's State Education Act requires the Ministry of Education to establish a core curriculum and obliges all schools to teach it at least in part.⁷⁷ In addition to public schools that must teach the entire core curriculum, the law allows for two types of private schools—'recognized non-state schools' that must teach 75% of the core curriculum in addition to their own curriculum and 'exempt schools' that must teach 55% of the core curriculum. Recognized non-state schools that teach 75% of the core curriculum are funded by the state and receive 75% of public school funding, while exempt schools that teach 55% of the core curriculum receive 55% of public school funding.⁷⁸ The purpose of

⁷⁵ *ibid* at ss 54–5, 77–9 to Justice Cheshin's opinion.

⁷⁶ Between 2000 and 2009 the ultra-orthodox elementary school system has grown 51%. In 2000 ultra-orthodox elementary schools comprised 15% of the elementary schools in Israel while in 2009 they already comprised 20% of elementary schools. Nahum Blas, 'Israel's Educational System – A Domestic Perspective', *Taub Center Policy Paper Series*, Policy Paper n 2010.04.

⁷⁷ The State Education Act, 1953.

⁷⁸ HC 4805/07, *The Center for Jewish Pluralism v Ministry of Education et al* (27 July 2008) s 1 to Judgment of Justice Procaccia.

the core curriculum as stated by the court is to enable the students to acquire basic knowledge, skills and values that are essential to allow each student to function independently in a pluralistic society, and it is based on shared universal humanistic values and on the character of Israel as a Jewish and a Democratic state. An additional purpose to that of creating a shared common denominator in a pluralistic society is to give every child in Israel the basic skills to create a life for itself and to fulfil its right to have an equal opportunity to develop her personality and herself, both as a child and as a grownup. The core curriculum includes the study of Judaism, citizenship, geography, Hebrew, English, math and sciences and physical education.⁷⁹

In 2002 the organization of high school teachers, which represents high school teachers in public schools, petitioned the Supreme Court, asking it to declare that the practice of the Ministry of Education to fund ultra-Orthodox recognized non-state schools despite the fact that these schools do not teach any part of the core curriculum and teach exclusively religious studies is illegal and discriminatory.⁸⁰ Accepting the petition the court gave an order prohibiting the funding of ultra-Orthodox schools that do not teach the core curriculum, but stayed the order for three years in order to allow the Ministry of Education time to enforce the core curriculum with cultural sensitivity.⁸¹

When, after three years petitioners realized that the state and the ultra-Orthodox educational authorities have done nothing to enforce the teaching of the core curriculum in ultra-Orthodox schools, while at the same time their funding continued unabated, they petitioned the court again requesting another court order against respondents. The Ministry of Education notified the court that it has concluded that at this time it is unwise to enforce the implementation of the core curriculum in ultra-Orthodox high schools, and asked the court to permit it to continue its attempts to reach an agreement with the ultra-Orthodox community as to the implementation of the core curriculum. The ministry could not say if, when and how such an agreement will be reached. In the meantime the Ministry suggested that the ultra-Orthodox schools that do not implement the core curriculum should continue to be funded at 55% of the funding given to state schools.⁸² The ministry acknowledged that having tens of thousands of students each year exempted from the teaching of the core curriculum jeopardizes important state interests, but opined that under the circumstances this was the right thing to do.⁸³

The court categorically rejected the position of the Ministry of Education. The failure to implement the core curriculum in ultra-Orthodox schools was viewed by the court as a serious violation of the rights of ultra-Orthodox school children to education and to equal opportunities, of the equality between

⁷⁹ *ibid* at s 31 to Judgment of Justice Procaccia.

⁸⁰ HC 10296/02, *The Organization of High School Teachers v Minister of Education et al.* (15 December 2004).

⁸¹ *ibid* at ss 19–20 to judgment of Justice Levy.

⁸² *The Center for Jewish Pluralism* (n 78) at ss 15–16 to judgment of Justice Procaccia. According to the Ministry, the core curriculum is not being taught only in ultra-orthodox boys high schools, while ultra-orthodox girls high schools do teach it.

⁸³ *ibid* s 17 to judgment of Justice Procaccia. The ultra-orthodox educational authorities objected to the suggestion to reduce their funding to 55% and insisted that it be kept at 75% and that they be exempt from the duty to teach the core curriculum.

ultra-Orthodox and all other schools, and of important state interests. While the court acknowledged the importance of the autonomy of parents to decide on the education of their children, it also stated that the importance of a common core curriculum is especially high in a country such as Israel where the divisions in society are as deep and as widespread.⁸⁴ It is precisely under such circumstances, said the court, that the need to establish a common denominator was especially urgent. Similarly, the right of parents to autonomy in choosing their children's education cannot supersede the right of the child to have a basic education that supplies him with the skills which allow him to fulfil his personality and his capabilities.⁸⁵ Furthermore, funding ultra-Orthodox schools while exempting them from the core curriculum, when all other schools are mandated to teach the core curriculum in order to get funding, is discriminatory.⁸⁶ The court agreed that deep cultural differences might justify a more gradual enforcement of the core curriculum on certain cultural groups than on others, but held that the need for gradual implementation of equal enforcement cannot be used to dispense with equal enforcement altogether.⁸⁷

Nevertheless, though the court was set to give an order mandating the enforcement of the core curriculum for the coming school year and terminating the funding of all schools that refuse to implement the core curriculum, it did not do so.⁸⁸ A few days before the judgment was due to be published, and after it was already written, the Knesset passed a law, the Unique Cultural Educational Institutions Act, which exempted ultra-Orthodox high schools for boys from the duty to teach the core curriculum, while continuing to grant them state funding.⁸⁹ This Act was an initiative of the ultra-Orthodox Knesset members aimed at circumventing the coming decision of the court and was supported by some secular Knesset members for political reasons.⁹⁰ Because the new law circumvented the court's expected ruling, the court refrained from issuing any orders, but published the detailed written opinion it had already prepared.

The reasoning of the court in these cases is a good example of what I term egalitarian pluralism—a pluralism which is committed to allowing cultural groups to lead their unique way of life, but within limits that oblige them to respect the equal rights of others, the fundamental rights of their own members, and the interests of the state. In contrast, proponents of the Unique Cultural Educational Institutions Act reject the position of the court and view the act, which circumvents the ruling of the court, as a means of promoting multiculturalism and pluralism by promoting the rights of cultural minority groups.⁹¹ According to the proponents of the act pluralism is achieved when a

⁸⁴ *ibid* s 58 to judgment of Justice Procaccia.

⁸⁵ *ibid* s 55 to judgment of Justice Procaccia.

⁸⁶ *ibid* ss 71–4 to judgment of Justice Procaccia.

⁸⁷ *ibid* ss 76–9 to judgment of Justice Procaccia.

⁸⁸ *ibid* s 83 to judgment of Justice Procaccia.

⁸⁹ Special Cultural Educational Institutions Act, 2008.

⁹⁰ Tami Harel Ben Shachar, 'Educational Autonomy, The Core Curriculum, and Public Funding of Education – The Special Cultural Educational Institutions Act' (2008) 12 *Mishpat U'Mimshal*, 281, fn 48–9 and accompanying text.

⁹¹ *ibid* fn 48.

cultural minority gets funding from the state to fund its unique way of life, without being under any obligation either to respect the values of the state or to respect the rights of others or the individual rights of its members. However, it should be stressed that although in the explanatory notes to the proposed act this reasoning was portrayed as a universal reasoning that applies to any cultural minority, the act is in fact carved to apply only the ultra-Orthodox community and the chances that any other cultural minority, such as the Palestinian Arab minority in Israel, will be granted an autonomous educational system, exempt from the core curriculum, but funded by the state, are very slim.⁹² Thus, the so-called pluralistic stance of the ultra-Orthodox politicians who proposed this act does not seem to represent a pluralistic agenda but a successful attempt to promote the illiberal agenda of the ultra-Orthodox community through the use of an allegedly liberal reasoning. Another example of a similarly successful attempt is the case of the WoW discussed earlier, in which the court itself gave precedence to the protection of the religious feelings of the Orthodox and ultra-Orthodox over the right to religious freedom and to equality of the WoW. In the case at hand the court rejected the attempt to release the ultra-Orthodox community from its obligations to the state, to their children and to other communities, but the court's egalitarian pluralistic approach was overturned by the legislature.

5. Conclusion

This article presented a strand of reasoning that can be detected in the Israeli Supreme Court jurisprudence with regard to religious pluralism, which I termed egalitarian pluralism. By discussing several cases in which the court applied this reasoning and others in which it did not, the article tried to demonstrate the meaning of egalitarian pluralism and to argue that in a country such as Israel in which the state gives massive support and state power to the Orthodox and ultra-Orthodox Jewish religion, the only way to maintain the state's commitment to equal rights and liberty for all is to enforce the precepts of egalitarian pluralism. While egalitarian pluralism respects the right of distinct cultural groups to lead their unique ways of life, it insists that this can only be done through active enforcement, preferably by the state, but alternatively by the court, of an equal allocation of resources and of public space as well as enforcement of certain duties on cultural communities such as the teaching of the core curriculum.

I further argued that while the Israeli Supreme Court may seem more activist when it comes to issues of religious freedom and religious communities than courts in western liberal countries such as the United States or Germany, it is important to judge this activism in the Israeli context, in which the Orthodox and ultra-Orthodox Jewish religion are granted considerable state power, which

⁹² Allegedly the act is not limited to ultra-orthodox schools, although these are the only ones that are specifically mentioned in it. The act includes a provision allowing any cultural group that meets certain conditions to apply for recognition as a special cultural group under the act. In practice, though, in light of the conditions of the act and the needs of the various communities it is quite obvious that the act is tailored for the ultra-orthodox community and that no other community would fit or would even want to fit into its provisions. *ibid* 325–31.

is then used to entrench their preferred status and to restrict the rights of others, such as homosexuals, religious feminists and non-Orthodox denominations. Thus, the special position of the Orthodox and ultra-Orthodox Jewish religion in Israel makes the 'hands off' pluralism which is advocated by many liberal thinkers and practiced in places such as the United States, and in which the state abstains from interfering in the life of religious organizations and religious communities, unsuitable for Israel. Perhaps ironically, it is precisely Israel's dual commitment to its nature as a 'Jewish and Democratic' state and the close ties it maintains between religion and state, which justify the court's active role in protecting liberal values. So long as it is only the illiberal streams of the Jewish religion that are given state power, and that this power is used to entrench unequal distribution and discrimination against unpopular minorities, the court should continue and even strengthen its commitment to enforcing egalitarian pluralism in order to protect religious pluralism and equality and liberty for all, as well as to protect Israel's dual commitment to both democracy and Judaism.